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No. 06-1712

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SUPREME COURT, U.S.

In the Supreme Court of the United States

SHARON MACY,

Petitioner,

v.

HOPKINS COUNTY BOARD OF EDUCATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

(1) Whether a Summary Judgment was the proper remedy when an employee has had her employment contract terminated and the termination has been established by various state courts.

(2) Whether the Petitioner has presented compelling reasons to grant the Petition where the Sixth Circuit's Opinion affirmed a rigorous analysis from the District Court which determined that the Petitioner was terminated due to making death threats on school children as opposed to her allegation that she was terminated because she was an employee who had been discriminated under the Americans With Disabilities Act, 43 U.S.C. § 12112(A).

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COUNTERSTATEMENT OF THE CASE

The issues on this appeal arise out of an employment relationship and the ultimate termination of the employment of the Petitioner Sharon Macy ("Macy") by the Respondent Hopkins County Board of Education ("Board") which occurred on November 30, 2000.

Macy was a middle school physical education teacher with the Board from August, 1981 to November 30, 2000. On June 6, 1986 Macy was involved in a bicycle accident (unrelated to her work) when she was hit by a semi truck in the course of a cross-country bicycle ride.

After returning to her teaching duties from the accident Macy began to have difficulty in the classroom and the Board voluntarily implemented a plan to assist Macy. Macy acknowledges that she made numerous requests to the Board to assist her with her health problems and that the Board complied with every request with the exception of one that had been made immediately prior to her termination.

In the late afternoon of November 1, 2000 an incident occurred during Macy's employment at South Hopkins Middle School in rural Western Kentucky which ultimately led to her termination. As Macy left the school she encountered members of the boys' basketball team and Macy threatened to kill the boys and reiterated the statement that she meant it (hereinafter "the death threats"). Macy also made derogatory comments relative to males and family relationships of the team members. Although Macy now vehemently denies the allegations, as the U.S. District Court and Court of Appeals noted, under the doctrine of issue preclusion Macy is denied from having made the statements.

Part of the basis for the doctrine of issue preclusion is that Macy was convicted by the Hopkins District Court on criminal charges arising out of the death threats and the conviction was upheld by the Hopkins (Kentucky) Circuit Court, the Kentucky Court of Appeals, the Kentucky Supreme Court, and the United States Supreme Court.

After the termination of her employment contract, Macy filed her statutory right under Kentucky law to request an Administrative Tribunal appointed by the Kentucky Department of Education to review her case. The Tribunal consisted of three (3) individuals, all non-residents of the Board's school district. After an extensive four (4) day hearing a decision was entered January 25, 2001 upholding the termination of Macy's contract and the Tribunal found Macy had made the death threats and derogatory comments.

Macy ultimately appealed the termination through the state courts of Kentucky and her termination was ultimately upheld by the Hopkins (Kentucky) Circuit Court on December 7, 2001, upheld by the Kentucky Court of Appeals on March 14, 2003, and upheld by the Kentucky Supreme Court on August 17, 2005.

In addition to her state court action, Macy had previously filed a complaint with the Equal Employment Opportunity Commission and the Kentucky Commission on Human Rights on February 21, 2000. There had been no action taken on the EEOC complaints until Macy and her attorney contacted the Kentucky Commission on Human Rights some time in 2001 after the termination of her employment. Ultimately the Kentucky Commission on Human Rights and the EEOC issued Orders indicating a finding of no probable cause to believe that the Board had engaged in any unlawful practice under appropriate civil rights laws and regulations.

Macy has also been subject of disciplinary proceedings through the Kentucky Department of Education via its Education Professional Standards Board Division ("Professional Standards Board"). The Professional Standards Board of Kentucky ultimately revoked Macy's teaching certificate in the Commonwealth of Kentucky on December 14, 2004.

In addition to the foregoing proceedings, Macy filed suit in the United States District Court for the Western District of Kentucky claiming that she had been terminated and discriminated against under the Americans With Disabilities Act, 42 U.S.C. § 12112(a) ("ADA"). Macy also had various claims in the District Court dealing with retaliation claiming she was terminated in retaliation for filing EEOC claims and that the Board's action of terminating her violated Kentucky's civil rights laws as codified in KRS Chapter 344.

On May 1, 2006 the U.S. District Court ruled that even in viewing the evidence in the light most favorable to Macy the evidence shows that the Board did not terminate Macy because of any actions related to her disability but because of her misconduct including her serious death threats to kill students. Macy appealed the decision but the U.S. Sixth Circuit Court of Appeals in an opinion dated April 12, 2007 upheld the decision of the District Court noting that summary judgment was the proper remedy and that under the doctrine of issue preclusion Macy was precluded from arguing that she did not threaten to kill the students. The Sixth Circuit opinion found that the the Kentucky courts decisions finding Macy guilty of threatening to kill students and the Administrative Tribunal's findings as upheld by Kentucky courts precludes her from arguing that the "death threats" were not the reasons for her termination.

REASONS FOR DENYING THE PETITION

I. SUMMARY JUDGMENT WAS THE PROPER REMEDY WHEN AN EMPLOYEE HAS BEEN TERMINATED FROM EMPLOYMENT AND THE BASIS FOR THE TERMINATION HAS BEEN ESTABLISHED BY VARIOUS STATE COURTS.

Macy wishes to argue to this Court that summary judgment was inappropriate in this case arguing that reasonable minds could conclude that a jury could reject the Board's explanation for Macy's termination. Macy further argues that the doctrine of issue preclusion should not affect the decision of this case and that the Board's termination of Macy's employment was based on her disability.

The Sixth Circuit and District Court were both correct in determining that summary judgment is proper if the evidence, taken in the light most favorable to the non-moving party, shows that there are no genuine issues of material fact and that the moving party is entitled to a judgment as a matter of law. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986), and Fed. R. Civ. P. 56(c). The moving party bears the burden of demonstrating there are no genuine issues of material fact which may be discharged by showing that there is an absence of evidence to support the non-moving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

In order for Macy to have prevailed under this case under the ADA she must establish certain factors which were established in the case of Monette v. Elec. Data Sys. Corp., 90 F.3d 1173 (6th Cir. 1996). Under Monette a Plaintiff such as Macy must show that: (1) he is an individual with a

disability; (2) he is "otherwise qualified" to perform the job requirements with or without the reasonable accommodation; and (3) he was discharged solely by reason of his handicap.

The District Court and Sixth Circuit were both correct in concluding that Macy has not met the third prong of this test as she was unable to establish she was discharged solely by reason of her handicap. Macy has never admitted that she threatened to killed the children and in fact in a deposition for this case denied making the threats to kill the boys or making inappropriate remarks about the boys or their families. As the Sixth Circuit noted, Macy's denial of the death threats could normally be sufficient to create a genuine issue of material fact regarding whether these parts of the Board's proffered reason were a pre-textual reason for termination. However, as the Sixth Circuit correctly pointed out, Macy is precluded from arguing that the underlying incidents did not occur by virtue of the doctrine of issue preclusion.

Kentucky courts explained the doctrine of issue preclusion in the case of Yeoman v. Commonwealth Health Policy Bd., Ky., 983 S.W.2d 459 (1998). The federal courts must give the same preclusive effect to a state court judgment as the judgment receives in the rendering state. 28 U.S.C. § 1738. Moreover, when an Administrative Tribunal, such as the Tribunal that ruled on Sharon Macy's case, adopts a decision, federal courts must give the agency's fact finding the same preclusive effect to which it would be entitled to in the state courts. Univ. of Tenn. v. Elliott, 478 U.S. 788, 106 S.Ct. 3220, 92 L.Ed.2d 635 (1986).

There were at least two (2) state decisions which caused the Sixth Circuit to apply the doctrine of issue preclusion to Macy. First, the Hopkins District Court had found Macy guilty of terroristic threatening in violation of Kentucky

Revised Statute 508.080. This judgment has been upheld through the Kentucky appellate court system. Secondly, the Administrative Tribunal appointed by the Kentucky Department of Education had determined that Macy made the inappropriate comments about the boys' family and made the death threats and likewise the Tribunal's determination has been upheld through the Kentucky court system. Since the doctrine of issue preclusion caused the Sixth Circuit to apply the finding of the facts that Macy did make the death threats, this issue was not in dispute for the purpose of determination of summary judgment. As such the summary judgment was the proper remedy in determining that the basis for the termination in this case was the "death threats by Macy" and not her disability.

II. THE PETITIONER HAS NOT PRESENTED COMPELLING REASONS TO GRANT A PETITION FOR WRIT OF CERTIORARI.

The Petitioner argues that this Court grant the petition in this case in order to resolve the split among the Circuits as to whether an employee may recover under the ADA if the employee's disability was a "motivating factor" as opposed to the "sole" factor in the decision to terminate. Petitioner has cited numerous courts of different circuits opinions dealing with the so-called "motivating factor test". However, the Sixth Circuit never had to address the motivating factor test as the doctrine of issue preclusion prevents Macy from arguing the basis for her termination was her disability.

In Petitioner's arguments to the Sixth Circuit Court of Appeals the Petitioner argued that the Board's proffered reason for termination was pre-textual because it had no basis in fact. In other words, Macy attempted to introduce evidence that the basis for her discharge ("the death threats")

never happened and they are factually false. As the Court of Appeals noted Macy testified in her deposition that she did not threaten to kill the boys, but she did admit seven (7) of the 31 incidents which were the basis for her termination.

The Sixth Circuit noted that normally Macy's deposition in which she denied making the threats could be sufficient to create a genuine issue of material fact regarding whether the Board's proffered reasons were pre-textual citing Abbott v. Crown Motor Co., 348 F.3d 537, 544 (6th Cir. 2003). However, the Sixth Circuit was correct in noting that Macy is precluded from arguing that the underlying incidents did not occur by virtue of the doctrine of issue preclusion. Therefore, since Macy was precluded from arguing the basis for her termination, a reasonable jury could not conclude that the Board's proffered reason was pre-textual and therefore, the ADA claim must fall as a matter of law.

It is interesting to note that the Sixth Circuit was correct in rejecting Macy's explanation. Macy argued that there was a reason for her verbal outburst, anxiety, anger, and irritability. Macy argued those factors which were exhibited in her behavior as a classroom teacher were the result of her disability. However, the Sixth Circuit correctly applied the law and that is that an employer may legitimately fire an employee for conduct, even conduct which occurs as the result of a disability, if that conduct disqualifies the employee from his or her job. Sullivan v. River Valley Sch. District, 197 F.3d 804 (6th Cir.).

Under Supreme Court Rule 10 a Petition for Writ of Certiorari will be granted only for compelling reasons. Additionally, a petition is to be rarely granted when the asserted error consists of a proper misapplication of a stated rule of law. From the Sixth Circuit opinion it is clear that the

employee Macy had a disability, but it is likewise clear that there is no compelling reason to grant the petition since Macy engaged in conduct which may have resulted from the disability but which still disqualified her from her employment.

CONCLUSION

In light of the foregoing there is no compelling reason to grant the Petition for Writ of Certiorari. The U.S. District Court and the Sixth Circuit, like many other courts and the tribunal administrative hearing, have determined there is no factual dispute in this case.

The "fact" that has been established is that Macy made death threats which were serious and were taken as serious threats by the middle school students. Macy further admitted giving fake detention slips to students, disobeying school rules, and making derogatory comments about parents in front of students. The Board, being her employer, had no choice but to terminate her employment because of her threats to the safety of the children and because her conduct was deemed to be unbecoming to a teacher as defined under relevant Kentucky educational law. It was Macy's conduct unbecoming a teacher which caused her to be terminated not her disability. Therefore, Respondent Hopkins County Board of Education respectfully requests the Court to deny the Petition for Writ of Certiorari in this case.

Respectfully submitted,

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